

FEDERAL CIRCUIT COURT OF AUSTRALIA

Obeid v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1354

File number(s): SYG 3450 of 2016

Judgment of: **JUDGE MANOUSARIDIS**

Date of judgment: 18 June 2021

Catchwords: **MIGRATION** – application for remedies under s 476 of the *Migration Act 1958* (Cth) (**Act**) in relation to decision of Administrative Appeals Tribunal (**Tribunal**) affirming a decision not to grant applicant a Partner visa on the ground the applicant did not satisfy Schedule 3 criteria and there are no compelling reasons for not applying those criteria – whether the applicant was denied a hearing to which he was entitled under s 360(1) of the Act due to the applicant’s arriving at the hearing before the Tribunal half an hour late and the Tribunal suggesting that the applicant provide any further evidence or submissions in writing after the hearing – whether the Tribunal misconstrued “*compelling reasons*” – whether the Tribunal relied on inconsistent findings or incoherent evidence – application dismissed

Legislation: *Federal Circuit Court Rules 2001* (Cth) Sch 1, Pt 3
Migration Act 1958 (Cth) ss 5(1), 5F, 360(1), 476
Migration Regulations 1994 (Cth) reg 1.15A, Sch 2, cls 820.211, 820.221, Sch 3, criteria 3001

Cases cited: *Babicci v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 77
MZYPZ v Minister for Immigration and Citizenship [2012] FCA 478

Number of paragraphs: 46

Date of hearing: 7 May and 8 June 2021

Place: Sydney

The Applicant: Appeared in person, assisted by an interpreter

Counsel for the First Respondent: Mr J Kay Hoyle

Solicitor for the First
Respondent:

Mills Oakley Lawyers

ORDERS

SYG 3450 of 2016

BETWEEN: MAAROUF HAJ OBEID
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE MANOUSARIDIS

DATE OF ORDER: 18 JUNE 2021

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The applicant pay the first respondent's costs, other than the first respondent's costs thrown away by reason of the adjournment of the hearing of 7 May 2021, such costs to be set in the amount of \$7,467.

REASONS FOR JUDGMENT

INTRODUCTION

- 1 The applicant applies for remedies under s 476 of the *Migration Act 1958* (Cth) (**Act**) in relation to a decision made by the second respondent (**Tribunal**) affirming the decision of a delegate of the first respondent (**Minister**) not to grant the applicant a Partner (Temporary) (Class UK) visa (**Partner visa**).

BACKGROUND

- 2 The applicant is a citizen of Lebanon. He first entered Australia in December 2009 as the holder of a Prospective Marriage (Subclass 300) visa (**Prospective Marriage visa**). That visa ceased on 22 September 2010. On 7 December 2010 the applicant applied for a Carer (Subclass 836) visa, but this was refused on 19 September 2012. The applicant then applied for a Protection (Subclass 866) visa. This, too, was refused by a delegate of the Minister and on 28 March 2013 the Refugee Review Tribunal affirmed the refusal. The applicant then applied for a Partner visa on 17 January 2014.

PARTNER VISA REQUIREMENTS

- 3 To have been entitled to the grant of a Partner visa the applicant had to satisfy, among other things, cl.820.211(2)(d)(ii) of Schedule 2 to the *Migration Regulations 1994* (Cth) (**Regulations**). That paragraph applies to an applicant who does not hold a “*substantive visa*”; and it requires such applicant to satisfy “*Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria*”. Criterion 3001 relevantly provides as follows:

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
 - (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 -
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;
- whichever is the later of:

- (iii) the last day when the applicant held a substantive . . .
visa . . .

4 The expression “*substantive visa*” is defined in s 5(1) of the Act to mean a visa other than a bridging visa, a criminal justice visa, or an enforcement visa. The only substantive visa the applicant held was the Prospective Marriage visa, which ceased on 22 September 2010. That means the applicant could not satisfy criterion 3001 at the time he applied for the Partner visa and, therefore, cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations. That, in turn, means that before the applicant could have been granted a Partner visa, and assuming he satisfied all other criteria, the Minister had to be satisfied there are compelling reasons for not applying criterion 3001.

5 Also relevant to the proceeding are two other provisions or sets of provisions. The first is cl 820.211(2)(a) of Schedule 2 to the Regulations, which requires that at the time of application for a Partner visa the applicant is the spouse or de facto partner of an Australian citizen. Subsection 5F(1) of the Act provides that a person is the “*spouse*” of another person if, under s 5F(2) of the Act, the two persons are in a “*married relationship*”. Under s 5F(2) of the Act, persons are in a “*married relationship*” if:

- (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
- (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- (c) the relationship between them is genuine and continuing; and
- (d) they:
 - (i) live together, or
 - (ii) do not live separately and apart on a permanent basis.

6 Subsection 5F(3) of the Act provides that the Regulations “*may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist*”. The Regulations have made provision, and this is to be found in reg 1.15A of the Regulations. Subregulation 1.15A(2) provides that, when considering an application for a Partner visa, among other subclasses of visas,, the Minister must consider all the circumstances of the relationship, including the matters set out in reg 1.15A(3) of the Regulations. Those matters include the following:

- (e) the financial aspects of the relationship, including any joint ownership of real estate or other major assets; any joint liabilities; the extent of any pooling of financial resources, especially in relation to major financial commitments; whether one person in the relationship owes any legal obligation in respect of the other; the basis of any sharing of day-to-day household expenses; and
- (f) the nature of the household, including any joint responsibility for the care and support of children; and the living arrangements of the persons; and any sharing of the responsibility for housework; and
- (g) the social aspects of the relationship, including whether the persons represent themselves to other people as being married to each other; and the opinion of the persons' friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities; and
- (h) the nature of the persons' commitment to each other, including the duration of the relationship; and the length of time during which the persons have lived together; the degree of companionship and emotional support that the persons draw from each other; and whether the persons see the relationship as a long-term one.

7 The second set of provisions specify requirements that must be satisfied at the time of decision. One is cl 820.221(2) of Schedule 2 which requires, subject to exceptions, that the applicant continues to meet the requirements of (among others) cl 820.211. Another requirement is cl 820.221(3) which provides that an applicant would continue to meet the requirements of cl 820.211(2) except where the relationship between the applicant and sponsoring partner has ceased because, among other things, the applicant “*has suffered family violence committed by the sponsoring partner*”. There are detailed provisions that identify the circumstances in which an applicant will be taken to have suffered family violence, but it is not necessary to set out those provisions in these reasons.

THE APPLICANT’S CLAIM FOR A PARTNER VISA

8 In his application for a Partner visa the applicant claimed he met the sponsor on 3 November 2013, and that on 14 December 2013 he and the sponsor committed to a shared life to the exclusion of all others. The applicant and sponsor married on 21 December 2013.

9 By letter dated 19 January 2015 the delegate informed the applicant (who was then legally represented) that at the time he applied for the Partner visa he was not the holder of a substantive visa, and in those circumstances the applicant was also required to satisfy

criterion 3001, noting that the criterion could be waived where there are compelling reasons for doing so.¹ The delegate invited the applicant to put forward claims he would like the delegate to consider and said the applicant should explain the circumstances that led the applicant to become a person who does not hold a substantive visa, and provide information relating to any compelling reasons the applicant feels applies to his case. The delegate also invited the applicant to provide further evidence to demonstrate that “*you and your Partner meet the criteria for a Partner visa*”.

- 10 The applicant did not respond to the delegate’s invitation to provide information and evidence. On 10 September 2015 the delegate decided not to grant the applicant a Partner visa.² The delegate found the applicant did not satisfy criterion 3001, and further found there were no compelling reasons to waive the Schedule 3 criteria.
- 11 On 26 August 2016 the applicant submitted to the Tribunal a statutory declaration in which the applicant declared that his relationship with the sponsor ended on 16 May 2016.³ The applicant said that approximately eight months after his marriage the applicant noticed a serious change in the sponsor’s appearance. The sponsor used to travel frequently to Queensland where she stayed with her grandparents. The sponsor’s appearance would markedly deteriorate following her stays in Queensland. The sponsor was not interested in starting a family.
- 12 In January 2016 the sponsor again left the applicant and travelled to Queensland where she stayed until 15 May 2016. After she returned the sponsor confronted the applicant and said she was in another relationship and was pregnant to the other person. The sponsor also confirmed she was using drugs. The sponsor told the applicant she wanted to go back to Queensland to be with her boyfriend, she had only returned to Sydney to collect her personal belongings and to demand a large sum of money from the applicant. The applicant told the sponsor he would not give her any more money, and he advised her to seek professional help. The sponsor threatened she would have her boyfriend, an ice addict, kill the applicant. The sponsor rang her boyfriend and put him on loud speaker. The boyfriend swore and threatened to kill the applicant if he did not hand over money to the sponsor, and said that he was coming down to Sydney to kill the applicant. The applicant immediately left the matrimonial

¹ CB85

² CB92

³ CB156-159

home hoping the sponsor would take her belongings and leave. When the applicant returned in the evening with a friend the sponsor had taken her belongings and left.

TRIBUNAL'S REASONS

- 13 The Tribunal identified there were four principal issues it was required to consider:⁴ was the applicant at any time the spouse or de facto partner of the sponsor? If so, did the applicant hold a substantive visa at the time he applied for the Partner visa or until a time that was no earlier than 28 days before the applicant applied for the Partner visa? Does the applicant continue to be sponsored by the sponsor? If not, did the sponsorship cease because the sponsor has died, or family violence has occurred, or because a child is involved?

Whether applicant was sponsored

- 14 The Tribunal accepted the applicant and sponsor were married to each other under a marriage that is valid under s 5F(2)(a) of the Act.⁵ The Tribunal then considered the matters identified in reg 1.15A(3) of the Regulations.

Financial aspects

- 15 The Tribunal was not satisfied there was sufficient evidence to establish that the financial circumstances of the parties were at any time consistent with two people in a genuine spousal relationship.⁶ The Tribunal:
- (i) found there was no evidence the applicant and sponsor had any shared liabilities, or that the applicant and sponsor had any shared assets except for some furniture the applicant claimed to have purchased for their use; and there are no records to establish how rent was paid;⁷
 - (j) gave no weight to receipts evidencing the purchase of clothes made before the day the applicant claimed he met the sponsor, or to receipts evidencing the purchase of jewellery in January 2016 because the Tribunal was not satisfied that such purchase occurred at a time in which the applicant was in a relationship with the sponsor, or to two receipts that were purportedly issued by a business recording no ABN or any deduction for GST;⁸

⁴ CB262, [55]

⁵ CB263, [64]

⁶ CB264, [70]

⁷ CB264, [69]

⁸ CB263-264, [66]

- (k) noted the applicant submitted a bank statement in the names of the applicant and the sponsor that disclosed no receipts from, or for the benefit of, the sponsor;⁹ and
- (l) the applicant provided no documents to corroborate his claims that he made cash contributions to his and the sponsor's regular household expenses, which included contributions towards rent, food, groceries, and utility bills.¹⁰

Nature of the household

16 The Tribunal was not satisfied the evidence established the applicant and sponsor were sharing a household at any time; and such evidence as there was available in relation to the nature of the parties' household arrangements was not consistent with that of two people who were at any stage in a genuine spousal relationship.¹¹ Although the Tribunal found there was limited documentary evidence suggesting the parties did reside together, this evidence did not outweigh "*the significant concerns that exists in relation to the credibility of the applicant's evidence*".¹² That is a reference to the Tribunal having recorded earlier in its reasons that it "*could not rely on evidence provided by the applicant where it is not corroborated by other documentary evidence*".¹³ The Tribunal relied on its finding that the evidence the applicant gave at the hearing was vague, confused, and inconsistent with evidence he provided at other points in the hearing and at other stages of his visa and review applications.¹⁴ That finding, in turn, was based on a number of matters. These included the Tribunal's finding that the evidence the applicant gave during the hearing about when his relationship with the sponsor ceased was inconsistent with that recorded in documents the applicant provided to the Tribunal;¹⁵ the applicant could not recall the specific date of the incident that led to the ending of his relationship with the sponsor;¹⁶ and evidence the applicant gave that the incident that led to the ending of his relationship with the sponsor occurred not long after the sponsor returned from her second trip to Queensland, which suggested that the incident occurred in early 2015, not on 15 May 2016 as the applicant had previously indicated.¹⁷

⁹ CB264, [67]

¹⁰ CB264, [67]

¹¹ CB265, [73]

¹² CB265, [73]

¹³ CB259, [43]

¹⁴ CB259, [43]

¹⁵ CB259, [43]

¹⁶ CB259, [44]

¹⁷ CB260, [45]

Social aspects of the household

- 17 Apart from evidence of their wedding day, the Tribunal was not satisfied the evidence can clearly establish the parties represented themselves to the community as two people in a genuine and continuing spousal relationship.¹⁸ The Tribunal referred to the applicant's evidence that the sponsor discouraged him from seeking any contact with her family as a consequence of which the applicant and sponsor at no stage socialised as a couple with any member of the sponsor's family; and the only friend of the sponsor the applicant referred to was the sponsor's boyfriend to whom the sponsor said she was pregnant.¹⁹ The Tribunal also referred to statutory declarations on which the applicant relied as supporting the applicant and sponsor having a genuine relationship, but the Tribunal found it could give this evidence limited weight "*due to its lack of detail and the distinct similarity in the content of the statutory declarations, which raises concern they do not reflect the individual thoughts of the people who have signed these documents*".²⁰

Nature of parties' commitment to each other

- 18 The Tribunal found that the nature of the commitment between the applicant and the sponsor "*was not at any time indicative of two people in a genuine and continuing relationship*".²¹ The Tribunal referred to the applicant's being unable to provide the name of the sponsor's mother, or the names of the sponsor's grandmother or aunt whom the applicant said the sponsor travelled to stay with in Queensland; the applicant was unable to provide details of where any of the sponsor's family members live, or provide any details of the sponsor's past life or family background, apart from saying the sponsor went to school.²² The Tribunal also referred to the applicant's evidence that at the time of the breakdown of the relationship the sponsor verbally abused him in a racist manner, making disparaging remarks about the applicant's sister, family, and the Lebanese community in general, noting this did not indicate the mindset of a person who made a genuine commitment to a relationship with the applicant.²³

¹⁸ CB266, [79]

¹⁹ CB265, [74]

²⁰ CB266, [79]

²¹ CB267, [85]

²² CB266, [81]

²³ CB266, [83]

Conclusion

19 The Tribunal concluded it was not satisfied the evidence before it establishes the applicant and sponsor were at any stage in a genuine and continuing spousal relationship.²⁴ The Tribunal therefore was not satisfied that at the time of application the applicant was in a spousal relationship with his sponsor and, for that reason, the Tribunal was not satisfied the applicant is the spouse of the sponsor within the meaning of s 5F of the Act and therefore does not meet the requirements of cl 820.211(2) of Schedule 2 to the regulations.²⁵

Whether Schedule 3 criteria should be waived

20 The Tribunal found that the last substantive visa the applicant held ceased on 22 September 2010. The applicant was required, but failed, to apply for the Partner visa within 28 days after 22 September 2010; and, for those reasons, the applicant did not satisfy criterion 3001. The Tribunal then considered whether there were compelling reasons for not applying that criterion.²⁶

21 The Tribunal began by considering the meaning of the expression “*compelling reasons*”. The Tribunal said that “*compelling reasons*” “*relate to the hardship that can result if an unlawful non-citizen wishing to remain in Australia on the grounds of his or her spouse or de facto relationship is obliged to leave Australia and apply from overseas*”.²⁷ The Tribunal also said that the existence of a genuine relationship and a desire not to separate are not by themselves sufficient to give rise to compelling reasons; the waiver should not be applied where it is reasonable to expect the applicant to leave Australia to apply outside Australia for a Partner visa; the waiver was introduced to provide flexibility to the Minister when compelling circumstances arise; and the explanatory statement to *Statutory Rules 1996 No.75* (Cth) provides examples where a waiver may be justified. The Tribunal also referred to the “*Departments Procedures Advice Manual*” which the Tribunal said “*states that the intent of the waiver provisions is to allow persons whose circumstances are genuinely compelling to regularise their status*”.²⁸ The Tribunal said, however, that it is not bound by Departmental policy, and that what amounts to compelling reasons is a question of fact, having regard to all of the circumstances.²⁹ Finally, the Tribunal said that although “*compelling reasons*” is not

²⁴ CB267, [86]

²⁵ CB267, [88]

²⁶ CB267-271

²⁷ CB268, [95]

²⁸ CB268, [96]

²⁹ CB268, [97]

defined, the reasons “*should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria*”.³⁰

22 The Tribunal:

- (m) was not satisfied the applicant’s immigration history, the circumstances that led the applicant to not hold a substantive visa, or his desire to stay in Australia provide a compelling reason for not applying the Schedule 3 criteria;³¹
- (n) found the applicant’s relationship with the sponsor ceased in or around May 2015 and considered that the length of the applicant’s relationship with the sponsor does not constitute a compelling reason to not apply the Schedule 3 criteria;³²
- (o) noted the applicant claimed he has depleted the money he had brought with him from Lebanon, and he holds no financial or other assets in Lebanon. Nevertheless, it was not satisfied these matters provide a compelling reason to not apply the Schedule 3 criteria, given that the applicant has family in Lebanon with whom the applicant maintained contact while he lived in Australia;³³
- (p) was not prepared to accept that the applicant would be at an increased risk above those in the general community if he were to return to Lebanon to lodge an offshore application;³⁴
- (q) was not satisfied the applicant’s claim regarding family violence in his relationship with the sponsor, or the psychological impact of the claimed family violence, provide a compelling reason not to apply the Schedule 3 criteria.³⁵

PROCEEDING BEFORE THE COURT

23 The matter first came for hearing before me on 7 May 2021. The applicant appeared without any legal assistance, even though in 2017 a Mr Leonard Jacob filed, on behalf of the applicant, an amended application and an affidavit in which Mr Jacob described himself as the applicant’s solicitor. Mr Jacob had taken no step to inform the Court that he ceased to be

³⁰ CB269, [98] referring to *MZYPZ v Minister for Immigration and Citizenship* [2012] FCA 478, at [10], and *Babici v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 77, at [24]

³¹ CB269, [100]

³² CB269, [101]

³³ CB269, [104]

³⁴ CB270, [107]

³⁵ CB271, [110]

the applicant's legal representative. At the hearing, the applicant informed me he had paid to Mr Jacob \$17,000 by monthly instalments of \$1,500, a claim the applicant substantiated by producing a document evidencing receipt of payments. Mr Jacob failed to provide any documents to the applicant regarding the applicant's proceeding. In those circumstances I decided that it would be appropriate to order that the hearing be adjourned. I adjourned the hearing to 2 pm on 8 June 2021 and ordered that the applicant could, by sending an email to the Court and the Minister's lawyers by 26 May 2021, state any additional ground of application on which the applicant wishes to rely. I reserved for later determination the question who, if any one, should pay the costs thrown away because of my adjourning the hearing. Through my associate I gave to the applicant a folder containing a copy of all the documents I understood had been filed by the parties in the proceeding. The applicant did not send any email stating additional grounds of application following the hearing of 7 May 2021.

24 At the hearing on 8 June 2021 the applicant said he wished to rely on the grounds of application stated in the amended application. After I explained the procedure I proposed to follow I invited the applicant to make submissions. The applicant asked me what I would like the applicant to say. I informed the applicant that he should tell me why he believes this Court should set aside the Tribunal's decision. The applicant said he respected the Tribunal's decision; he told the Tribunal his life story. The applicant said he did not wish to make any submissions in relation to any of the grounds stated in the amended application.

25 After counsel for the Minister completed his submissions, the applicant said he had come from Lebanon; he had sold all his property there and brought to Australia money; when he arrived in Australia he wanted to settle and have children; relatives in Lebanon had sold land but cheated him of his share and he no longer speaks to them; he had good intentions in relation to the woman he intended to marry when he arrived in Australia; and explained why he did not have contact with the sponsor's family. At the end of the hearing, a person who I understood was the applicant's current wife said the applicant was a good man and submitted I should help him.

26 I reiterated what I had earlier explained to the applicant, that this Court's jurisdiction in relation to the proceeding is limited to determining whether, on the grounds on which the applicant relies, the Tribunal made some legal error. The matters on which the applicant and his wife addressed me relate to the merits of the applicant remaining in Australia; they do not

disclose any jurisdictional error by the Tribunal. Given the applicant made no other submissions, the only grounds I will consider are the grounds stated in the amended application.

GROUND 1

27 The amended application contains three grounds. Ground 1 is as follows:

Ground 1. Jurisdictional error – The Tribunal’s decision was affected by jurisdictional error in that the Applicant did not receive a fair and meaningful hearing as required by s 360(1) of the Act. The following facts (i) the Applicant arriving late for the hearing (ii) the Interpreter was in a hurry to finish in a punctual manner (iii) the Tribunal failed to effectively explain the meaning of “Compelling Reasons” to the Applicant, combined to diminish the Applicant’s entitlement to participate effectively in the Hearing in such a way that enlivened the obligation of procedural fairness.

PARTICULARS

- 1.1 The cutting short of the hearing period was incompatible with the Applicant’s interests and curtailed the nature of the hearing afforded to the Applicant such that was not a real or meaningful hearing.
- 1.2 In paragraph 4 of the Decision Record, the Tribunal noted that the hearing commenced 30 minutes late because the Applicant arrived late.
- 1.3 The Tribunal also noted that the interpreter needed to finish in a punctual manner consequently the hearing ended within the schedule time, despite the late commencement.
- 1.4 In lieu of additional time, the Applicant was given an opportunity to provide the Tribunal with further evidence or arguments after the hearing

28 This ground makes two claims. The first is that the holding of the hearing for one and a half hours rather than the scheduled two hours diminished the applicant’s entitlement to a meaningful hearing as required by s 360(1) of the Act. The second claim is the Tribunal failed “*to effectively explain*” the notion of “*compelling reasons*”.

Shortened hearing

29 It is the case that the hearing before the Tribunal began approximately 30 minutes after the scheduled commencement time because the applicant arrived late. The Tribunal asked the applicant if he would like the opportunity to provide the Tribunal with any further evidence or arguments after the hearing, which would allow the Tribunal to take evidence from a witness the applicant had brought to the hearing. The applicant, who was represented at the hearing, agreed; and the Tribunal allowed the applicant to provide further documents and submissions by 21 October 2016. The applicant, through his legal representative, provided

further documents by email sent on 21 October 2016.³⁶ I am not satisfied, however, that in these circumstances the applicant was denied a hearing to which he was entitled under s 360(1) of the Act.

30 The ground does not identify any evidence the applicant claims he was not given a reasonable opportunity to give, or any submission he was not given a reasonable opportunity to make. For that reason alone this part of the ground fails. Further, there is evidence on the basis of which it is reasonably open to find, and I do find, that the applicant had been given a hearing to which he was entitled under s 360(1) of the Act.

(r) First, the Tribunal told the applicant it wanted to be satisfied that what the Tribunal was suggesting “*is not preventing you from telling me what you want today, and . . . I won’t be satisfied that you’ve had the opportunity to tell me what you want to tell me today*”;³⁷ and that the Tribunal needed to be “*satisfied that if we proceed in the way I suggested, you do not feel that you have been cut short today*”.³⁸ By agreeing with the Tribunal’s suggestion, it may be inferred the applicant and his legal representative were satisfied the applicant had said all he wanted to say to the Tribunal.

(s) Second, none of the documents the applicant’s lawyer provided to the Tribunal by email sent on 21 October 2016 consists of evidence by the applicant or submissions in support of the applicant’s case. The documents are statutory declarations made after 7 October 2016, being the day of the hearing before the Tribunal, and documents that can reasonably be inferred were not in the applicant’s possession at the hearing on 7 October 2016.

(t) Third, the applicant did not ask the Tribunal to provide him with any additional hearing time.

Explanation of “*compelling reasons*”

31 This part of ground 1 assumes the Tribunal gave some explanation of the meaning of “*compelling reasons*”, but the explanation was not effective. The ground, however, does not articulate the explanation the Tribunal gave, or the explanation the Tribunal ought to have given. Nor does it articulate, to the extent it is intended to be claimed, that the explanation the

³⁶ CB233

³⁷ T30.35 The transcript of the hearing before the Tribunal is annexed to the affidavit of L Jacob 16.11.2017

³⁸ T30.45

Tribunal gave was not the explanation the Tribunal ought to have given. For these reasons, this part of ground 1 fails.

32 In any event, as counsel for the Minister has submitted, the Tribunal did explain to the applicant the notion of “*compelling reasons*”. The Tribunal informed the applicant the “*law does not precisely specify what a compelling reason is that would make it appropriate to not apply the schedule 3 criteria*”; and that it “*is possible for a decision-maker such as the tribunal to consider all reasons that an applicant puts to it including reasons that have arisen since the time a visa application was made*”.³⁹ This explanation was calculated to invite the applicant to put forward all matters that conceivably could be relevant to determining whether there are any compelling reasons for not applying the Schedule 3 criteria.

Conclusion on ground 1

33 For the above reasons, ground 1 fails.

GROUND 2

34 Ground 2 is as follows (errors in original):

Ground 2: Jurisdictional Error – In determining whether or not compelling reasons existed to waive compliance with the criteria in Sch.3 of the Regulations, the Tribunal fell into an error of law by misconstruing the definition of “Compelling Reasons, thereby giving rise to a Jurisdictional Error.

PARTICULARS

2.1 In paragraph 95 of the Decision record, the Tribunal stated that “Compelling Reasons relate to the hardship that can result if an unlawful non-citizen wishing to remain in Australia on the grounds of his or her spouse or de facto relationship is obliged to leave Australia and apply from Overseas”

2.2 The Tribunal’s definition does not accord with the case law definition of “Compelling Reasons” in that Compelling Reasons do not always equate to hardship. For example the fact the length of parties’ relationship where it has spanned more than two years, the fact there is an Australian citizen child of the relationship are not “hardship” per se even though they can constitute “Compelling Reasons”.

35 This ground assumes that the Tribunal proceeded on the view that “*compelling reasons*” equated with “*hardship*”. It may be accepted the Tribunal characterised the matters that may give rise to “*compelling reasons*” as hardship; but the Tribunal did not determine whether there were compelling reasons for not applying the Schedule 3 criteria in the case of the applicant by asking whether the applicant would suffer hardship if he were compelled to

³⁹ T4.15

apply offshore for a Partner visa. That is, the Tribunal did not equate “*compelling reasons*” with “*hardship*” per se. As is apparent from the parts of the Tribunal’s reasons I have set out in paragraph 21 of these reasons, the Tribunal referred to a number of different sources that are relevant to elucidating the meaning of “*compelling circumstances*”, including two Federal Court authorities.⁴⁰ The Tribunal proceeded on the view that although “*compelling reasons*” is not defined in order to qualify as “*compelling reasons*”, the reasons “*should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria*”.⁴¹

36 Ground 2, therefore, also fails.

GROUND 3

37 Ground 3 is as follows (errors in original):

Ground 3: Jurisdictional Error – The Tribunal made inconsistent and incoherent findings leading to a failure to exercise its jurisdiction and thereby giving rise to a Jurisdictional Error.

PARTICULARS

- 1.1 In paragraph 28, the Applicant provided information, which if analysed, would assist in determining the date the parties’ relationship ceased. In paragraph 48, the Tribunal stated “For this reason, the Tribunal has preferred the oral evidence given by the Applicant during the hearing in relation to when the parties relationship ceased. After considering this issue at length, the Tribunal, finds the parties relationship ceased in or around May 2015.
- 1.2 However, the Tribunal’s finding in paragraph 48 is inconsistent with the Applicant’s evidence in paragraph 28 in that the Applicant did not state May 2015 as the relevant date in his oral evidence during the hearing.
- 1.3 Secondly, in paragraph 72 the Tribunal stated “The Tribunal the limited documentary evidence suggesting the parties did reside together, the Tribunal that suggests they did (e.g limited evidence didn’t outweigh your significant concerns about credibility of his evidence?”
- 1.4 Tribunal’s finding in paragraph 72 is completely incoherent and leaves unanswered and open the question whether the Tribunal accepted that the parties lived together or not.

38 This ground makes two claims: inconsistent findings, and incoherence.

⁴⁰CB269, [98] referring to *MZYPZ v Minister for Immigration and Citizenship* [2012] FCA 478, at [10], and *Babici v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 77, at [24]

⁴¹CB269, [98]

Inconsistent findings

39 The first claim appears to be the Tribunal made findings in paragraphs 28 and 48 of its reasons that are inconsistent with each other. The Tribunal, however, does not make any finding in paragraph 28 of its reasons. The Tribunal there sets out evidence the applicant gave about the incident that led to the applicant's cessation of his relationship with the sponsor. Paragraph 48, on the other hand, does contain a finding, namely, that the applicant's relationship with the sponsor ended in around May 2015, following an argument between the parties over money in which the applicant claimed he was abused and threatened.

40 In any event, the finding the Tribunal made in paragraph 48 of its reasons is not inconsistent with the applicant's evidence set out in paragraph 28 of the Tribunal's reasons. In that paragraph the Tribunal records the applicant stating that the sponsor had travelled to Queensland twice, and the incident ending the relationship occurred not long after the sponsor returned from the second trip she made to Queensland. In paragraph 44 of its reasons the Tribunal found that the applicant's oral evidence indicated that it was in early 2015 that the sponsor returned from her second trip to Queensland; and in paragraph 47 of its reasons the Tribunal said that the applicant's oral evidence "*would indicate*" the incident "*occurred in the first few months of 2015*". In making the finding contained in paragraph 48 of its reasons, the Tribunal took into account the applicant's oral evidence, bank records, and a statutory declaration of Dr Adel.

41 This part of ground 3, therefore, fails.

Incoherence

42 This part of ground 3 relies on what is clearly an incoherent sentence in paragraph 72 of the Tribunal's reasons. This part of ground 3 claims that this left completely open the question whether the Tribunal accepted that the parties lived together or not. That claim cannot be accepted. The Tribunal records its findings about whether the applicant and sponsor ever shared a household in paragraph 73 of its reasons. The Tribunal concluded it was not satisfied the available evidence established that the parties were sharing a household at any time.

Conclusion on ground 3

43 For these reasons, ground 3 fails.

DISPOSITION AND COSTS

44 I propose to order that the application be dismissed.

45 The Minister submits the applicant should be ordered to pay the Minister's costs, other than the costs thrown away because the hearing on 7 May 2021 was adjourned; and the Minister submits that those costs should be fixed in the amount of \$7,467, being the amount provided for by Part 3 of Schedule 1 to the *Federal Circuit Court Rules 2001* (Cth). After I explained to the applicant the nature of orders for costs, and the usual rule that the successful party is entitled to an order for costs, I asked the applicant whether he wished to make any submission against my ordering costs against him. The applicant said he did not wish to make any submissions.

46 I am satisfied that the usual order as to costs should apply to the costs the Minister has incurred, other than the costs thrown away because of the adjournment of the hearing on 7 May 2021. I am also satisfied that those costs should be set in the amount of \$7,467.

I certify that the preceding forty-six (46) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Manousaridis.

Associate:

Dated: 18 June 2021